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Nos. 83-537, 83-693

In The

Supreme Court of the United States

October Term, 1983

MASSACHUSETTS LABORERS DISTRICT COUNCIL AND LABORERS, LOCAL 609,

Petitioners,

vs.

ABREEN CORP., MARTIN BERNARD AND ISADORE WASSERMAN,

Respondents.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

ABREEN CORP., MARTIN BERNARD AND ISADORE WASSERMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS MARTIN BERNARD AND ISADORE WASSERMAN IN OPPOSITION

JOHN FOSKETT*
LAURENCE J. DONOGHUE
DEUTSCH, GLASS & BROOKS
One Liberty Square
Boston, MA 02109
(617) 482-7370

*Counsel of Record

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether the owners and developers of property which is the target of unlawful secondary picketing, and who are directly injured by such picketing, have standing to sue under Section 303 of the Labor Management Relations Act, 29 U. S. C. § 187.

2. Whether the courts below erred in holding an international union liable for threatening a supplier to a construction site in support of unlawful secondary picketing taking place at the site.

3. Whether an international union which participated in and encouraged unlawful secondary picketing activity taking place at a construction site by successfully bringing about the cessation of deliveries to the site was properly held liable for damages.

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Nos. 83-537, 83-693

In The

Supreme Court of the United States

October Term, 1983

MASSACHUSETTS LABORERS DISTRICT COUNCIL AND LABORERS, LOCAL 609,

Petitioners,

vs.

ABREEN CORP., MARTIN BERNARD AND ISADORE WASSERMAN,

Respondents.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

ABREEN CORP., MARTIN BERNARD AND ISADORE WASSERMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS MARTIN BERNARD AND ISADORE WASSERMAN IN OPPOSITION

PROCEEDINGS BELOW

The opinion of the District Court for the District of Massachusetts appears at page A35 of the Appendix to the Petition for Writ of Certiorari of the Massachusetts

Laborers District Council and Laborers, Local 609.[1] The opinion of the Court of Appeals for the First Circuit is reported at 709 F. 2d 748 and appears in the Appendix to the Petition for a Writ of Certiorari of the Massachusetts Laborers District Council and Laborers, Local 609 at page A11.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the First Circuit (Pet. App. p. A8) was entered on June 14, 1983. Petitions for rehearing and a suggestion for rehearing *en banc* were denied by the Court of Appeals for the First Circuit on July 28, 1983 (Pet. App. A1, A4). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 303 of the Labor Management Relations Act of 1947, 29 U. S. C. § 187, and Section 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. §158(b)(4)(B).

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1 Separate appendices are contained in the petitions filed jointly by the Massachusetts Laborers District Council and Laborers, Local 609 (No. 83-537), and by the Laborers' International Union of North America, AFL-CIO (No. 83-693). Since much of the material in the appendices is duplicative, for purposes of convenience and simplicity references will be made in this opposition only to pages of the Appendix to the Petition of Massachusetts Laborers District Council and Laborers, Local 609.

Section 303 of the LMRA reads as follows:

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4)(B) of the National Labor Relations Act provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is—

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with

any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

• • •

STATEMENT OF THE CASE

These cases were brought pursuant to Section 303 of the Labor Management Relations Act, 29 U. S. C. § 187. Following a bench trial in the United States District Court for the District of Massachusetts, respondents Martin Bernard and Isadore Wasserman ("Bernard and Wasserman") and respondent Abreen Corp. ("Abreen") were awarded damages from petitioners Massachusetts Laborers District Council ("District Council"), Laborers, Local 609 ("Local 609") and Laborers' International Union of North America AFL-CIO ("International"). The court found that petitioners had engaged and participated in secondary picketing in violation of 29 U. S. C. § 158(b)(4)(B) (Pet. App. A40-A42). The court of appeals affirmed the district court's finding that this conduct violated Section 303.[2] (Pet. App. A19-A27).

The evidence was as follows: In 1977, as trustees of SN Realty Trust, Bernard and Wasserman began de-

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2 The court of appeals reversed the district court on certain matters pertaining to the award of damages (Pet. App. A27-A32). These matters are not at issue before this Court.

velopment of a mall and hotel complex in Natick, Massachusetts. Bernard and Wasserman's role in the project included obtaining the land upon which the complex would be constructed, entering into leases with mall tenants, obtaining both permanent mortgage financing and temporary construction loan financing, and entering into agreements with the architect and general contractor for construction of the complex. Subsequent to completion of the project in 1980, SN Realty Trust transferred all of its assets, including the leases of the mall tenants, to Natick Village Mall Associates, a limited partnership. Bernard and Wasserman are the general partners of Natick Village Mall Associates (Pet. App. A17). It was in this capacity that suit was brought.

In August, 1978, Bernard and Wasserman entered into an agreement with Abreen by which Abreen became the general contractor for the Natick mall and hotel project. Construction of the project began in late summer, 1978. During the week of March 19, 1979, Local 609 picketed Seppala & Aho, a non-union steel erection subcontractor working on the site. In response to this picketing Abreen set up a reserve gate, known as "Gate 1", for use by Seppala & Aho's employees and suppliers. The remaining gate, "Gate 2", was for use by all other contractors, employees and suppliers on the site. On March 26, 1979, picketing activity on the site increased dramatically. Between that date and April 16, 1979 members and agents of Local 609 and the District Council picketed both entrances to the Natick project. Some of these pickets carried signs which identified neither the union engaging in the picketing nor the employer being picketed, and which stated that "minority workers" on the site were working

for inadequate wages. The district court found, and the court of appeals agreed, that these "minority worker" pickets were a sham and were in fact controlled by Local 609 (Pet. App. A22, A40 n. 3). The picketing disrupted work on the site and delayed the delivery of essential materials to the project (Pet. App. A40).

The district court found that the picketing between March 26 and April 16 violated Section 8(b)(4)(B) of the NLRA. The court concluded that the picketing of the neutral gate, and the use of picket signs which did not identify the employer with whom the union had the primary dispute, violated the *Moore Dry Dock* standards governing permissible picketing activity.[3] (Pet. App. A40-A41). The court also concluded that the picketing had the secondary and unlawful object and purpose of coercing neutral contractors and suppliers not to do business on the site while non-union subcontractors were present (Pet. App. A41). The court of appeals affirmed the district court's conclusion that the picketing violated Section 8(b)(4)(B) (Pet. App. A19-A21). In this Court, petitioners do not challenge the lower courts' conclusion that the picketing at the site between March 26 and April 16 was unlawful.

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3 In *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950) the National Labor Relations Board held that union picketing on a construction site or other location where more than one employer is present is *prima facie* primary and lawful only if it meets the following conditions: (1) the picketing is limited to times when the primary employer is located on the site; (2) at the time of the picketing the primary employer is engaged in its normal business at the site; (3) the picketing is limited to places reasonably close to the location of the primary employer; and (4) the picketing clearly discloses that the dispute is with the primary employer. 92 NLRB at 549.

On March 25, 1979, the day before the unlawful picketing commenced, Mr. Aldo Baretta, Vice President of Duraflex Sales and Service, an affiliate of Durastone Flexicore, received a telephone call from Arthur Coia, Vice President of the International. Durastone Flexicore, a Rhode Island supplier of precast concrete plank used on the Natick project, was scheduled to make a delivery to the site on the following day, March 26. In his conversation Coia told Baretta to expect a "problem" at the site because of the picketing. As a result of this conversation, Baretta cancelled all shipments to the site (Pet. App. A37). Previously Raymond Baretta, an official of Durastone Flexicore, had been told by the local shop steward that Durastone employees, who were represented by Local 315 of the International, would refuse to load trucks destined for the Natick site. A few days later Durastone was picketed by a group of individuals led by the Business Agent of Local 609 (Pet. App. A37-A38).

REASONS FOR DENYING THE WRITS

I. This Court Need Not Review The Lower Courts' Conclusion That Owners And Developers Of A Construction Project Which Was The Object Of Unlawful Secondary Picketing, Who Were Directly Injured By Such Picketing, Have Standing To Sue Under Section 303 Of The Labor Management Relations Act Because Standing Clearly Exists Under Prior Decisional Authority.

As found by both the court of appeals and the district court, the object or purpose of petitioners' picketing was to impede construction at the Natick construction site

(Pet. App. A18, A41). Although Bernard and Wasserman's damages—lost rental income resulting from the delay in completion of the project—was exactly the sort of injury that the unions hoped to bring about by their unlawful activity, petitioners nevertheless challenged Bernard and Wasserman's standing and seek review in this Court to explore general issues of the scope of Section 303 standing.

Respondents Bernard and Wasserman respectfully submit that, whatever the outside scope of standing under Section 303, review of the instant case is inappropriate in that they are clearly within the statute's protection. Indeed, as the court of appeals correctly recognized, Bernard and Wasserman have standing to sue under either of two independent theories, each well-established in prior case law. First, owners or developers of property that is the target of unlawful picketing have been recognized as proper parties to raise Section 303 claims.[4] *See,*

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4 Petitioners attempt to distinguish the rights of Bernard and Wasserman in their capacity as general partners of Natick Village Mall Associates, in which capacity they brought the present action, from their rights as trustees of SN Realty Trust, the original owner and mortgageholder owner of the Natick site. *See,* Petition of Massachusetts Laborers District Council and Laborers, Local 609 at pp. 11-12. For the reasons stated by both the court of appeals and the district court, this purported distinction is invalid. As both courts below recognized, Natick Village Mall Associates, as transferee and assignee of all SN Realty's rights in the project, is nothing more than the *alter ego* of SN Realty Trust (Pet. App. pp. A17, A36). In such circumstances, any difference in the manner or form of business organization is of no significance. *See, Abbott v. Local Union No. 142,* 429 F. 2d 786, 789 (5th Cir. 1970); *Rodgers v. Local No. 8, American Federation of Musicians,* 403 F. Supp. 870, 872 (E. D. Wisc. 1975), *aff'd,* 544 F. 2d 519 (7th Cir. 1976).

Pennsylvania Railroad Co. v. National Maritime Union, 206 F. Supp. 797, 799 (E.D. Pa. 1962) (owner of a facility against which picketing was directed had standing under Section 303 to seek damages resulting from unlawful picketing of the owner's lessee, since the purpose of the defendants' activities was to obstruct work at the facility); *Allentown Racquetball & Health Club, Inc. v. Building and Construction Trades Council,* 525 F. Supp. 156 (E.D. Pa. 1981) (owner of premises under construction may seek damages under Section 303 for secondary boycott and picketing activities involving construction site).

Further, the district court specifically found that Bernard and Wasserman's damages were "directly related to the violative practices of the defendants." (Pet. App. A42). Courts have consistently held that parties directly or intentionally injured as a result of unlawful secondary activity may recover damages under Section 303. *See, W. J. Milner and Co. v. International Brotherhood of Electrical Workers, Local 349,* 476 F. 2d 8, 12 (5th Cir. 1973). *See also, Sapp v. Drivers, Chauffeurs & Helpers Local Union 639,* 542 F. 2d 224, 225 (4th Cir. 1976) (Employee of primary employer's subcontractor granted standing: injury an intentional, not "incidental", consequence of union's unlawful secondary pressure); *Gilchrist v. United Mine Workers,* 290 F. 2d 36, 39 (6th Cir.), *cert. denied,* 368 U. S. 875 (1961). Indeed, petitioners' citation on *W. J. Milner & Co., supra,* is puzzling, given the court of appeals' reliance on *Milner* to *support* Bernard and Wasserman's right to maintain the instant action. In *Milner,* an exclusive sales agent of the primary object of the unions' unlawful boycott was held to have standing under Section 303 where the agent was directly in the boycott's "line of

fire" and damages to its interest were "reasonably foreseeable". 476 F. 2d at 12. The present case fits squarely within the parameters of *Milner* since, as found by the district court, Bernard and Wasserman were directly injured by petitioners' acts and, in light of the purpose of those acts, to impede construction of the mall and hotel project, its their damages—lost rental income resulting from the delay—were certainly foreseeable.

This Court's opinion last term in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, — U. S. —, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) does not support an examination of Bernard and Wasserman's standing in the instant case. In *Associated General Contractors*, the Court held that several labor unions' vague and general claims that the defendant, an association of employers, directed coercion against certain remote third parties provided no basis for standing to seek damages under Section 4 of the Clayton Antitrust Act, 15 U. S. C. § 15.

Neither the reasoning nor the facts of *Associated General Contractors* weaken Bernard and Wasserman's claim in the case at bar. The first point of distinction is the nature of the respective injuries. *Associated General Contractors* turned at least in part on the fact that the unions were not competitors or consumers of AGC or its services, and thus not within the primary zone of protection of the antitrust laws. 74 L. Ed. 2d at 738-39. In the case at bar, however, plaintiffs Bernard and Wasserman were "neutrals" engaged in business at the Natick Mall construction site. The purpose of Section 303 is to protect such neutrals, and this protection extends to neutrals who are neither contractors nor employers. *See, W. J.*

Milner and Co. v. International Brotherhood of Electrical Workers, Local 349, 476 F. 2d 8, 12 (5th Cir. 1973); *Pennsylvania Railroad Co. v. National Maritime Union,* 206 F. Supp. 797, 799 (E.D. Pa. 1962). Moreover, the peculiar status of labor unions and collective bargaining under the antitrust laws, an additional factor relied upon by the Court in *Associated General Contractors* (74 L. Ed. 2d at 739), is obviously not a relevant consideration in the present case.[5]

The facts in *Associated General Contractors* were also quite different from those in the case at bar: The unions' allegations in *Associated General Contractors* were vague and unspecific, identifying neither the parties allegedly coerced nor any specific element of damages. 74 L. Ed. 2d at 729 & n. 3. In the case at bar, however, Bernard and Wasserman alleged, and the courts below found, a specific, direct relationship between petitioners' activities (the picketing at the construction project) and the resulting injury to Bernard and Wasserman (delay in completion of the project).[6] *See, Industrial Investment Develop-*

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5 The court of appeals found *Associated General Contractors* not to be controlling on the grounds set forth in the text (Pet. App. A18 n. 2).

6 Contrary to petitioners' assertion, allowing both Abreen and Bernard and Wasserman to recover damages does not raise the specter of conflicting or duplicative claims that was of concern in *Associated General Contractors.* There is simply no inconsistency or duplication in allowing Abreen to recover damages incurred in an effort to minimize delay in completing the project and Bernard and Wasserman to recover their losses because Abreen was not entirely successful in this effort. It is significant that petitioners identify no element of damages which represents conflicting liability.

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ment Corp. v. Mitsui & Co., Ltd., 704 F. 2d 785, 786 (5th Cir. 1983) (antitrust plaintiff's allegation of direct injury meets standing requirement set forth in *Associated General Contractors*).

In sum, since Bernard and Wasserman's standing to seek relief under Section 303 was recognized in accordance with well-established precedent, it is not necessary for this Court to grant certiorari to explore the outer reaches of Section 303 standing, and the Court should not do so.

II. The Petitioner Laborers' International Union Was Properly Held Liable For Threatening A Supplier In Violation Of Section 8(b) (4) (ii) (B) Of The National Labor Relations Act, 29 U. S. C. § 158(b) (4) (ii) (B).

The petitioner in No. 83-693, the International, contends that it was improperly held liable for damages resulting from the unlawful secondary activities involving the Natick site. The International's claim is that the court of appeals erred as a matter of law in concluding that Coia's telephone call to Baretta was a "threat" which vio-

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If reference is made to *Associated General Contractors* at all, the present case is entirely consistent with its holding. The allegations in *Associated General Contractors* were that the defendant association coerced certain landowners and contractors, and that this coercion affected the landowners' and contractors' relationship with union contractors. The Court expressly acknowledged that these union contractors would themselves have had standing to raise an antitrust claim. 74 L. Ed. 2d at 740. As found by the district court in the present case, the intent of the union was to pressure Abreen and other contractors and suppliers to cease performing work on plaintiffs' project. If Bernard and Wasserman's position is similar to that of any of the parties in *Associated General Contractors*, it is to that of the union contractors who this Court recognized as proper parties to bring suit.

lated NLRA Section 8(b)(4)(ii)(B). The International argues that this finding of a "threat" was wholly the creation of the court of appeals, and not supported by the district court's findings. A review of the record, however, belies this contention.

The district court discussed the Coia telephone call in the following terms:

> There was no purpose for the call other than to promote the interest of the picketing. It makes no difference if the tone of the call was friendly; *the message was clear—the pre-cast concrete was not to be delivered*—and the message had the desired effect.

(Pet. App. A42) (emphasis added). The language used by the court makes clear that its conclusion was that the Coia-Baretta telephone call constituted a threat. Indeed, it is difficult to attribute any other meaning to the court's words. Any ambiguity on this point is eliminated by examination of a colloquy between the court and counsel after the International moved for a directed verdict at the close of plaintiffs' testimony. In that discussion the court recognized that any liability of the International would depend on a finding that the phone call constituted a threat (Transcript of Trial Proceedings, November 23, 1981 at pp. 141-44). The court of appeals was thus correct in concluding that the district court had found Coia's phone call to Baretta to be a "threat" violative of NLRA Section 8(b)(4)(ii)(B).[7] Liability was properly assessed against the International on this basis.

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7 It is entirely clear that the court of appeals understood the district court's finding to be that Coia's telephone call constituted a threat: "The [district] court found that . . . Coia was implicitly threatening Baretta with economic pressure if Durastone delivered the pre-cast concrete." (Pet. App. A27).

Contrary to the International's assertion, *NLRB v. Servette, Inc.*, 377 U. S. 46 (1964) does not compel a contrary result. As the International claims, the Court in *Servette* did state that a union's warning that peaceful, lawful handbilling would occur was not a "threat" violative of Section 8(b)(4)(ii)(B). Petition of Laborers' International Union at 9, *quoting, Servette*, 377 U. S. at 57. This is simply an application of the rule that it is not improper or unlawful to threaten conduct that is itself lawful and protected. This principle has no application to the present case, however, since both courts below found that the picketing at the Natick site from March 26 to April 16 was *unlawful* and *unprotected, because, inter alia,* its object was a secondary one: to coerce neutrals not to do business on the site (Pet. App. A19-A23, A40-A41).

The International makes much of the fact that Seppala & Aho could lawfully have been picketed at Gate 1 of the project without violating the NLRB's *Moore Dry Dock* standards. However, the lawfullness of picketing is determined not by its location but by its purpose or object. *Gulf Coast Building & Supply Co. v. International Brotherhood of Electrical Workers, Local 480,* 428 F. 2d 121, 124-25 (5th Cir.), *cert. denied,* 400 U. S. 942 (1970); *Pickens-Bond Construction Company v. United Brotherhood of Carpenters,* 586 F. 2d 1234, 1241 (8th Cir. 1978); *Iron Workers Local 433 v. NLRB,* 598 F. 2d 1154, 1157-58 (9th Cir. 1979). Since both courts below found the object of the picketing in the present case to be secondary and unlawful, *Servette* has no application and the International's threats in support of that picketing violated Section 8(b)(4)(ii)(B) of the NLRA. *See, Maxey v. Meat Cutters, Local 126,* 627 F. 2d 912, 914-15 (9th Cir. 1980) (threat to engage in unlawful picketing violates Section 8(b)(4)(ii)(B)).

III. The International's Successful Attempt To Interfere With Deliveries To The Construction Site Was Participation In The Unlawful Picketing Sufficient To Impose Liability.

Even if the courts below had not viewed Coia's phone call as a threat violative of NLRA Section 8(b)(4)(ii)(B) the International properly was held liable for damages flowing from the unlawful secondary activity. An international union is liable for the acts of an affiliate where it participates in, supports or encourages the affiliate's misconduct. *Carbon Fuel Co. v. United Mine Workers,* 444 U. S. 212, 216-18 (1979); *United Mine Workers v. Gibbs,* 383 U. S. 715, 735-38 (1966). Coia's phone call to Baretta can properly be viewed as support or encouragement of the unlawful Natick picketing of Local 609 and the District Council sufficient to impose liability on the International. In this respect, the timing of the phone call is critical. Although the Laborers' picketing at Gate 1 began on March 19, Coia did not call Baretta to inform him of the picket line until March 25, the day before the unlawful picketing began at both gates. The coincidence of Coia's telephone call to the commencement of the increased, unlawful picketing on the project supports the inference that the call was not simply an exchange of information between acquaintances but an attempt by the International to disrupt deliveries to the site in furtherance of the picketing. This would be sufficient encouragement of, if not participation in, the picketing to justify the imposition of liability on the International. Thus, even absent the finding that Coia threatened Baretta, the International's liability does not offend the standards enunciated by this Court in *Carbon Fuel* and *Gibbs.*

CONCLUSION

For the reasons set forth above, these cases present no issues of substantial public importance requiring determination by this Court or of infidelity to applicable precedent of this Court. Therefore, the petitions for writ of certiorari should be denied.

Respectfully submitted,

MARTIN BERNARD AND
ISADORE WASSERMAN,

By their attorneys,

JOHN FOSKETT*
LAURENCE J. DONOGHUE
DEUTSCH, GLASS & BROOKS
One Liberty Square
Boston, MA 02109
(617) 482-7370

*Counsel of Record